# In the Supreme Court of the United States

OCTOBER TERM, 1968

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No. 739

CLAUDE B. MORGAN, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Tried by a jury in the United States District Court for the Northern District of Florida, petitioner was convicted on seven counts of mail fraud and was sentenced to imprisonment for five years and fines totalling $7,000.

The only issue raised before the court of appeals and in the petition for a writ of certiorari relates to the denial of petitioner's motion for a new trial based on an alleged conversation during the trial between one of the jurors in his case and a stranger. Because the court of appeals was not clear about the district

court's ground for denying the motion, the case was first remanded for further findings. See 380 F. 2d 915 (Pet. App. 27-29). On the basis of those supplemented findings and its own review of the record, the court of appeals then affirmed. 399 F. 2d 93 (Pet. App. 13-24). No further review is warranted.

The underlying circumstances fully appear from the two opinions of the court of appeals and from the elaborate findings by the district court (set out in the opinion below at Pet. App. 16-20). On the basis of petitioner's motion, the district court held a full hearing at which counsel were free to introduce evidence and each juror was separately examined by the court, with counsel given the opportunity to cross-examine. The district court observed the various witnesses, and rejected the disputed testimony of petitioner's principal witness—his close friend—that one of the members of the jury had, before verdict, announced in a conversation with an outsider that he had formed the conclusion that petitioner was guilty. Rather, the court found on the basis of the testimony that the only conversation involving one of the jurors in this case—which might in any event have taken place after verdict (Pet. App. 19-20)—did not bear upon the issue of petitioner's guilt or innocence (Pet. App. 18). The court of appeals noted that the record demonstrated that "the trial judge was keenly aware of his responsibility" and "used every possible means to ferret out the truth" (Pet. App. 22). The court was convinced that none of the trial judge's findings on the diametrically opposed factual contentions could be considered "clearly erroneous" (Pet. App. 23 n. 2, 24).

The court thus unanimously concluded: "Summoning as we must our most perceptive antennae to detect prejudicial communications with a juror, we nevertheless affirm the trial court's findings that the jury was not compromised" (Pet. App. 13).

We rely on the findings and opinions of both courts below in urging that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

DECEMBER 1968

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